DR GANESAN PERIASAMY A

v.

DATO' K KUMARAENDRAN & ANOR

HIGH COURT MALAYA, PULAU PINANG B
YAACOB MD SAM JC
[WRIT OF SUMMONS NO: MT4-22-59-2008]
20 APRIL 2009

CIVIL PROCEDURE: *Pleadings - Defamation - Slander - Particulars - Defamatory meaning not pleaded - Whether claim must fail* C

CIVIL PROCEDURE: *Pleadings - Striking out - Order 18 r. 19(1) Rules of the High Court - Arguments relating to limb (a) to be dealt with separately from arguments relating to limbs (b) to (d) - Court to look only at four corners of pleadings and not to any ancillary evidence or affidavits under limb (a) - Court to go through evidence under limbs (b) to (d) - Issues to be critically assessed and tested* D

CIVIL PROCEDURE: *Striking out - Defamation action - Alleged slanderous words uttered in court by counsel during proceedings - Occasion of absolute privilege - No cause of action - Claim scandalous, frivolous, vexatious and abuse of process of court - Whether striking out allowed* E

TORT: *Defamation - Slander - Alleged slanderous words uttered in court by counsel during proceedings - Counsel holding watching brief - Whether statement made in course of judicial proceedings - Whether actionable slander - Whether absolute privilege applies* F

The plaintiff was a private medical practitioner. The 1st defendant was an advocate and solicitor and the senior partner of the 2nd defendant. The plaintiff had been charged with criminal intimidation pursuant to a police report lodged by one Krishnasamy and the 1st defendant had held a watching brief for Krishnasamy in the criminal proceedings. At the outset of the criminal proceedings, the plaintiff had claimed trial to the charge and bail was offered. The plaintiff's counsel made an application that the plaintiff not be handcuffed while being taken out of court whilst bail was being processed. At this juncture, the 1st defendant stood up and addressed the court with the following words, which formed the basis of this action: "This is ridiculous. G H I

A Just because he is a doctor does not mean he should be given exemption. He is charged with a serious offence and must be handcuffed. Even Anwar Ibrahim was handcuffed." The presiding magistrate did not make any order that the plaintiff be handcuffed. After the case was adjourned, the police personnel took custody
B of the plaintiff and handcuffed and detained him pending bail being processed. The plaintiff contended that the 1st defendant's conduct was with a malicious intent to embarrass him and that he had suffered loss of professional reputation. Plaintiff also contended that the 1st defendant had acted beyond his authority as a
C watching brief counsel and had no locus to address the court. The defendants applied pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 to strike out the writ of summons and the statement on the grounds that the matters complained of took place on an occasion of absolute privilege and that the writ of
D summons and statement of claim disclosed no cause of action, was scandalous, frivolous, vexatious and an abuse of the process of court. The learned deputy registrar allowed the application with costs and hence this appeal.

E **Held (dismissing the plaintiff's appeal with costs):**

(1) The practice when dealing with an application under O. 18 r. 19 is that arguments relating to limb (a) are to be dealt with separately from arguments relating to limbs (b) through (d). When dealing with an application under limb (a), the court will
F look only at the four corners of the pleadings and not to any ancillary evidence or affidavits to determine whether the plaintiff has made out a cause of action. When dealing with an application under O. 18 r. 19, limb (b) through (d), the court will go through the evidence and satisfy itself whether
G the case is unarguable. It is insufficient to merely state that there are issues that require a trial without critically assessing and testing the issues. (paras 19 & 20)

(2) The plaintiff had not pleaded how the words bore any
H defamatory meaning. Hence, it was submitted that the alleged embarrassment suffered by the plaintiff was a result of a judicial decision to dismiss the plaintiff's application and not as a result of anything that the 1st defendant did or said. On that ground alone the claim must fail. (para 23)

I

(3) No action will lie for defamatory words spoken by an advocate in his professional capacity in the course of proceedings before a judicial tribunal, even if they were made maliciously and not with the object of supporting the case of his client and were entirely irrelevant to the subject matter of the proceedings. Absolute privilege does not apply to any statement made not in the course of legal proceedings. (paras 20 & 38)

(4) The learned magistrate had allowed the 1st defendant to address the court and make a submission. Hence, the issue whether the 1st defendant had exceeded his authority as a watching brief counsel was no longer a triable issue. The words complained were uttered by the 1st defendant on a privileged occasion *ie*, in the course of judicial proceedings and made in open court during the bail application. The statement complained was clearly within the line indicated by the authorities as the boundary of the advocate's privilege and therefore constituted absolute privilege. (paras 45 & 46)

Case(s) referred to:

Cooper & Lybrand v. Singapore Society of Accountant & Ors [1988] 3 MLJ 134 ***(refd)***

Geyer et al v. Meritt and Gouge [1980] 16 BCLR 27 ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219, [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Lincoln v. Daniels [1961] All ER 740 ***(refd)***

Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar [2001] 3 CLJ 65 CA ***(refd)***

Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar [2003] 4 CLJ 20 FC ***(refd)***

(Maharaj Kumar) Jagat Mohan Nath-Sah Deo v. Kalipado Ghosh [1922] AIR Patna 104 ***(refd)***

Munsters v. Lamb [1883] 11 QB 588 ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yusof & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***

PP v. Seeralan Suppiah [1985] 1 CLJ 524; [1985] CLJ (Rep) 250 SC ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Richardson v Harley [1911] SC 464 ***(refd)***

S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771, [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2000] 5 CLJ 435 HC ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 11
Penal Code, s. 506
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), (2)

Other source(s) referred to:
Gately on Libel and Slander, 8th edn, paras 381, 385, 400
Gately on Libel and Slander, 9th edn, para 13.13, p 293

For the appellant/plaintiff - En Reveentharan; M/s Raveen Assoc
For the respondents/defendants - Porres Royan (Dato' CV Kumar & Raj Shankar with him); M/s Kumar Partnership

Reported by Amutha Suppayah

JUDGMENT

Yaacob Md Sam JC:

[1] This is an appeal by the plaintiff against the decision of the learned deputy registrar, who had allowed the defendants' application pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 that the plaintiff's writ of summons and statement of claim dated 1 February 2008 (encl. 1) ought to be struck out on the grounds that it is frivolous, vexatious and an abuse of the process of court, and do not disclose a cause of action, and that the action be dismissed with costs.

[2] I have dismissed the plaintiff's appeal (encl. 17) with costs on the grounds set out below.

The Background

[3] Plaintiff is a private medical practitioner, having his own clinic known as Putra Poliklinik. The 1st defendant is an individual practicing as an advocate and solicitor of the High Court of Malaya and the senior partner of the 2nd defendant, Messrs. Kumar & Co.

[4] The plaintiff's grievance against the defendants arises out of certain words utterred by the 1st defendant on 9 July 2007 during the proceedings before the Georgetown Magistrate's Court (2), in which the plaintiff had been charged in a Criminal Case No. 83-

1739-2007 on a charge of criminal intimidation under s. 506 of the Penal Code. The charge was related to Pulau Tikus Report No. 475/07 lodged by one Krishnasamy a/l Kalimuthu. The 1st defendant held a watching brief for Krishnasamy with respect to the criminal case in which the later was the complainant.

[5] At the outset of the proceedings, after the charge was read out to the plaintiff and he claimed trial to the charge, the prosecuting officer offered bail at RM5,000 with one surety and asked for an additional condition that the plaintiff's passport be surrendered to the court. Plaintiff's counsel did not object to the amount proposed by the prosecuting officer. At that point the 1st defendant stood up and addressed the presiding magistrate. He brought to the presiding magistrate's attention to the injunction that had been ordered against the plaintiff in the civil suit and suggested that similar terms be imposed as condition of bail. The matters raised were recorded by the presiding magistrate.

[6] For convenience the notes of proceedings are reproduced as follows:

NOTA KETERANGAN

Kes No. 83-1739-2007

9/7/2007:

C/Insp. Khairul

OKT – hadir

En Rayer b.p. OKT

Dato' Kumarendran – watching brief.

Tuduhan dibaca, diterang dan faham.

Minta bicara.

Tawaran – RM5,000/= dan tahan passport.

P/Bela : setuju dengan jumlah jaminan. Pohon tarikh awal untuk bersih nama.

Dato' Kumar : OKT doktor. Saya pohon syarat-syarat yang dijamin. Charge serious. Saya pohon impose syarat seperti di High Court. Kes Abdul Rahim b.

Hj. Ahmad. Saya pohon supaya diimpose syarat-syarat untuk ikat jaminan seperti yang diimpose oleh YA Hakim Mahkamah Tinggi.

En. Rayer : Saya membantah apa yang dikata oleh Dato' Kumar. Syarat-syarat patut seperti yang dikenakan oleh pihak polis. Prinsip jaminan hendak pastikan OKT hadir di mahkamah. OKT adalah seorang doktor adalah orang dihormati. Perintah adalah interim sehingga 19/7/07- tidak jadi tetap. Sebagai counsel watching brief dan sebagai mempengaruhi mahkamah.

Mahkamah : Tangguh sebentar.

Kes disebut semula: 11.20 a.m.

Pihak-pihak seperti terdahulu.

Mahkamah : Jaminan ditetapkan sebanyak RM5,000/= dengan 1 surety. Pasport ditahan.

27.9.07 (B).

T.t. (Nor Hapipah).

The Alleged Defamatory Words

[7] After the presiding magistrate had made her order on the issue of bail, plaintiff's counsel Mr. RSN Rayer made an application that the plaintiff "not be handcuffed while being taken out of court" for the purpose of him being detained in the police lockup whilst bail was being processed. At this juncture, the 1st defendant stood up and addressed the court the following words which form the basis of the plaintiff's action as set out in para 18 of the statement of claim:

> This is ridiculous. Just because he is a doctor does not mean he should be given exemption. He is charged with a serious offence and must be handcuffed. Even Anwar Ibrahim was handcuffed.

[8] However, the presiding magistrate did not make any order that the plaintiff be handcuffed. After the presiding magistrate had adjourned the case, the police personnel in the court took custody of the plaintiff and handcuffed and detained him pending bail being processed and conditions of bail met. The presiding magistrate did not record the impugned words.

[9] It is the plaintiff's contention that the 1st defendant was not entitled to act in such a way. The act was conducted with a malicious intent to embarrass the plaintiff and to put him in a prejudicial position, been handcuffed and taken out of court as a criminal and kept in the lock-up from 11am to 13pm until his papers for bail was cleared.

[10] The incidents received wide coverage from the local newspapers, which the plaintiff contended caused him to loss his professional reputation and had been stigmatized by the public as a criminal, despite yet to be found guilty.

[11] It is also the plaintiff's contention that the 1st defendant on that material day had acted beyond his authority as a watching brief counsel and had no locus to address the court. With his wrongful act, the plaintiff had suffered damages in terms of mental and emotional anguish.

[12] By this action, the plaintiff is claiming RM5 million as special damages, exemplary and punitive damages and other reliefs (para 26 of statement of claim).

Defence Of The 1st And 2nd Defendant

[13] In the defence of the 1st and 2nd defendant (encl.2), the defendants pleaded, *inter alia*, that:

(a) the matters complained of took place on an occasion of absolute privilege; and

(b) the writ of summons and statement of claim discloses no cause of action, is scandalous, frivolous, vexatious and an abuse of the process of court.

[14] Hence, the 1st defendant and 2nd defendant state that anything said or done in the course of any proceedings in a court of justice towards the administration of the law is an absolute privilege, regardless of whether the words were spoken knowingly or with malice and without any probable cause. All actions of any kind in respect of words spoken during judicial proceedings are absolutely forbidden and is not recognized by law.

A **Application To Strike Out Plaintiff's Claim**

[15] After filing the statement of defence (encl. 2A), the defendants applied by encl. 3 (saman dalam kamar dated 10 April 2008) to strike out the writ of summons and the statement of
B claim for all or any of the following reasons, that:

(a) it discloses no reasonable cause of action; or

(b) it is scandalous, frivolous and vexatious; or

C (c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is an abuse of the process of the court.

[16] The said application was supported by the following
D affidavits:

(i) Defendants' affidavit in support dated 7 April 2008, affirmed by the 1st defendant (encl. 4);

E (ii) Defendants' affidavit in reply dated 27 May 2008, affirmed by the same (encl. 8); and

(iii) Defendants' affidavit in reply no. 2 dated 23 June 2008, affirmed by the same (encl. 11).

F **[17]** Plaintiff opposed the said application *vide* the following affidavits:

(i) Afidavit balasan dated 5 May 2008, affirmed by plaintiff (encl. 5);

G (ii) Afidavit Tambahan dated 13 May 2008, affirmed by the same (encl. 7);

(iii) Afidavit balasan no. 2 dated 2 June 2008, affirmed by Sanisvara Nethaji Rayer (encl. 9); and

H

(iv) Afidavit balasan plaintif dated 10 June 2008, affirmed by plaintiff (encl. 10).

[18] The learned deputy registrar, after hearing full submissions from counsel for both parties, allowed the application with costs.
I This appeal arises from that decision.

Order 18 r. 19 RHC

[19] In considering an application pursuant to O. 18 r. 19(1)(a), O. 18 r. 19(2) specifically provides that no evidence is to be admissible on an application under para (a). The practice when dealing with an application under O. 18 r. 19 is that arguments relating to limb (a) are to be dealt with separately from arguments relating to limbs (b) through (d). Consequently, when dealing with an application under limb (a), the court will look only at the four corners of the pleadings and not to any ancillary evidence or affidavits to determine whether the plaintiff has made out a cause of action.

[20] When dealing with an application under O. 18 r. 19, limb (b) through (d), the principle to be adopted is that the court will go through the evidence and satisfy itself whether the case is unarguable. It is insufficient to merely state that there issues that require a trial without critically assessing and testing the issue. The principle was laid down by the Supreme Court in *Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 where Peh Swee Chin SCJ, speaking for the Supreme Court said:

> In *Tractors*, the defendants applied to set aside the pleadings there on the ground that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Federal Court, on appeal, regarded themselves as precluded from examining the evidence for determining whether the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with fine-toothed comb and decided to agree with the learned judge at the first instance and restored the High Court's decision. It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in application under O. 18 r. 19 unless such application is limited solely to the that any pleading does not disclose a reasonable cause of action or defence as the case may be.

[21] The Supreme Court in that case construed that the letter by the plaintiff intended to release all the defendants in the suit. Basing on such undertaking, the Supreme Court found that the action of the plaintiff against the defendants was bound to fail. The court then struck out the plaintiff's claim under O. 18 r. 19 of the Rules of High Court 1980 for being scandalous, frivolous and vexatious or that it would prejudice, embarrass and delay a fair trial.

[22] The aforesaid principle was refined in the decision of the Court of Appeal in *Pengiran Othman Shah Pengiran Mohd. Yusof & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257 where at p. 266, Siti Normah Yaakob JCA (as her lady then was) speaking for the court in O. 18 r. 19 case said as follows:

> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627.) Likewise, where the affidavit evidence discloses a dispute of facts, such fact must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

[23] It is submitted on behalf of the defendants that there is no cause of action pleaded against the defendants. Defendants averred that even if the allegations contained in the statement of claim are true, they do not disclose a cause of action. It is also contended by the defendants that the said words are not capable of bearing any defamatory meaning either in their plain or ordinary meaning or by way of innuendo. The plaintiff has not pleaded how the words bear any defamatory meaning. Hence, it is submitted that the alleged embarrassment suffered by the plaintiff was a result of a judicial decision to dismiss the plaintiff's application and not as a result of anything that the 1st defendant did or said. On that ground alone the claim must fail.

Defence Of Absolute Privilege

[24] Apart form disclosing no cause of action, on behalf of the defendants it was also submitted that the plaintiff's claim must also fail on the grounds that it is frivolous, vexatious and an abuse of the process of court as the words complained of by the plaintiff attract the doctrine of absolute privilege.

[25] The defence of absolute privilege was specifically pleaded by both defendants in their defence. At para 20 of the statement of defence of the 1st and 2nd defendants, the defendants aver that the matters complained of took place on the occasion of absolute privilege, namely in the course of judicial proceedings during which the 1st defendant acting in his professional capacity as an advocate and solicitor, in particular as counsel holding a watching brief over Criminal Case No. 83-1739-2007.

[26] For convenience the defendants' defence of absolute privilege reads as follows:

> 20. In answer to the Plaintiff's entire claim, the Defendants state that the matters complained of took place on an occasion of absolute privilege.
>
> **Particulars**
>
> The matters complained of took place in the course of judicial proceedings, namely in the course of the 1st Defendant acting in his professional capacity as an Advocate and Solicitor of the High Court of Malaya, in particular as counsel holding a watching brief over Criminal Case No. 83-1739-2007 at the Georgetown Magistrate's Court(s) on the morning of 9.7.07 on behalf of the Complainant, Krishnasamy a/l Kalimuthu.

[27] By reason thereof, the defendants averred that anything said or done in any proceeding in a court of justice towards the administration of the law is absolutely privileged, regardless of whether the words were spoken knowingly or with malice and without any probable cause. Hence, all actions of any kind in respect of words spoken during judicial proceedings are absolutely forbidden and not recognized by law.

[28] On behalf of the plaintiff it was submitted that the 1st defendant was not entitled to act in such a manner. The act was conducted with malicious intent to embarrass the plaintiff and put him in a prejudicial position. These matters were pleaded by the plaintiff in his statement of claim.

[29] Paragraphs 21 and 22 of the statement of claim read as follows:

> 21. Plaintif plid bahawa segala tindakan-tindakan Defendant Pertama yang merupakan agen Defendan Kedua adalah dibuat dengan niat jahat dengan tujuan memalukan Plaintif, merendahkan Plaintiff dan memprejudiskan pandangan orang ramai terhadap Plaintif.
>
> 22. Plaintif juga plid bahawa tindakan Defendan Pertama yang merupakan agen Defendan Kedua telah mengakibatkan Plaintif dengan salah digari dan dengan salah ditahan di lokap Mahkamah dari jam 11.00 pagi hingga 1.00 tengahari dan insiden itu telah mendapat liputan luas dalam suratkhabar-suratkhabar tempatan sehingga menyebabkan Plaintiff mengalami malu dan ini telah menyebabkan Plaintiff kehilangan reputasi secara am dan secara khusus kehilangan reputasi dalam profesionnya sebagai seorang Doktor.

The Law On Absolute Privilege

[30] It is settled law that no action will lie for defamatory words spoken by an advocate in his professional capacity in the course of proceedings before a judicial tribunal, even if they were made maliciously and not with the object of supporting the case of his client and were entirely irrelevant to the subject matter of the proceedings.

[31] In *Munsters v. Lamb* [1883] 11 QB 588 an action was brought by Mr. Munster, a barrister against Mr. Lamb, a solicitor, for a defamatory expressions which were said to have been used by Mr. Lamb while acting as an advocate for a woman by the name of Hill, against whom criminal proceedings had been instituted by Mr. Munster. In the course of the proceedings against Hill, the defendant Lamb, acting as her advocate, said : "I have my own opinion for what purpose all these young women may have been resident in the house of Mr. Munster. I can believe that there may have been drugs in the house of Mr. Munster, and I have my own opinion for what purpose they were there, and for what they may have been used." It was alleged on behalf of the plaintiff that the defendant by using these words meant that the plaintiff had kept and used and was accustomed to keep and used, drugs for the purpose of obtaining or of facilitating criminal connection, or for the purpose of procuring abortion, or for some other criminal and immoral purposes.

[32] Brett MR who gave the leading decision in the Court of Appeal said at p. 599: A

> This action is brought against a solicitor for words spoken by him before the court of justice, whilst he was acting as an advocate for a person charged in that court with an offence against the law. For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of person ill-will or anger towards the prosecutor arising out some previously existing course; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been. B C D

[33] His Lordship then said at p. 600:

> Actions for libel and slander have always been subject to one principle; defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slender when they are made upon certain occasions. It is not that these statements are libel or slander subject to a defence, but the principle is that defamatory statements, if they are made on a privilege occasion, from the very moment when they are made, are not libel or slander of which the law takes notice. Many privileged occasions have been recognized. The occasion with which we now have to deal, is that a defamatory statement has been made either in words or by writing in the course of an inquiry regarding the administration of the law. It is beyond dispute that statements made under these circumstances are privileged as to some persons, and it has been admitted by the plaintiff's counsel that one set of these persons are advocates : it could not be denied that advocates are privileged in respect of at least some defamatory statements made by them in the course of inquiry as to the administration of law … But it was contended that an advocate cannot claim the benefit of the privilege unless he act *bona fide*, that is, for the purpose of doing his duty as an advocate, and unless what he says is relevant. That is the question which we now have to determine. E F G H I

[34] The Master of the Rolls then answered the question that he had formulated earlier as follows at p. 603-604:

> Of the three classes – judges, witness, and counsel – it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what be says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting *bona fide*, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct. In *Rex v. Skinner* (1), Lord Mansfield, a judge most skilful in enunciating the principles of the law, treated a counsel as standing in the same position as a judge or a witness. In *Dawkins v. Lord Rokeby* (2) a most careful judgment was delivered on behalf of all the judges in the Exchequer Chamber, and the opinion of Lord Mansfield was cited and adopted. If the authority of these two cases is to be followed, counsel are equally protected with judges and witnesses. I will refer to *Kennedy v. Hilliard* (3), and in that case Pigott, CB, delivered a most learned judgment, in the course of which he said (4): "I take this to be a rule of law, not founded (as in the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written,

> in a court of justice, shall do so with his mind uninfluenced by fear of an action for defamation or a prosecution for libel." Into the rule thus stated the word "counsel" must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy.

[35] Brett MR then set out, what can be said, is the *ratio decidendi* of the case at p. 605:

> With regard to counsel, the question of malice, *bona fides*, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law.

[36] The principle in Munster was re-stated with approval by the English Court of Appeal in *Lincoln v. Daniels* [1961] All ER 740 at p. 743-744. The principle in *Munster* has been also applied uniformly across the Commonwealth. The Court of Appeal of New Zealand in *Richardson v Harley* [1911] SC 464 at p. 468 specifically referred to and approved by Patna Appeal Court in *(Maharaj Kumar) Jagat Mohan Nath-Sah Deo v. Kalipado Ghosh* [1922] AIR Patna 104 at p. 106. The Supreme Court of Canada in the case of *Geyer et al v. Meritt and Gouge* [1980] 16 BCLR 27 at p. 32 applied the principle in *Munster* but did not specifically make reference to the decision.

[37] In *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771, [1988] 1 CLJ (Rep) 233 Wan Hamzah SCJ said:

> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statement about another which are defamatory and in fact untrue: *Watt v. Longsdon*. The occasions are called occasions of qualified privilege. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which the party he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v. Bush.*

A The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it.

[38] The principle in *Lincoln v. Daniels (supra)* and *Munster (supra)* was applied in this country in the case of *Thiruchelvasegaram Manickanickavasegar v. Mahadevi Nadchatiram* [2000] 5 CLJ 435; *Mahadevi Nadchatiram v Thiruchelvasegaram Manickanickavasegar* [2001] 3 CLJ 65 (Court of Appeal); [2003] 4 CLJ 20 (Federal Court) where it was held that absolute privilege does not apply to any statement made not in the course of legal proceedings.

[39] It is said in *Gately on Libel and Slander,* 9th edn. at para 13.13 p. 293 that the privilege is not confined to words spoken by an advocate before the court; it extends also to any statements made in respond to inquiries by the other side in litigation or contained in a pleading or other document incidental to the action settled by him, even though such statement are irrelevant for the purposes of the action and introduced unnecessarily and without any instructions from his client and without any information which would justify them. But a statement by counsel outside the court room but with reference to the proceedings is not the subject of absolute privilege.

[40] In *Cooper & Lybrand v. Singapore Society of Accountant & Ors* [1988] 3 MLJ 134 a passage from paras 381, 385 and 400 of *Gately on Libel and Slander* (8th edn) was quoted and reaffirmed that statements made in judicial proceedings or statements contained in documents made in judicial proceedings are absolutely privileged.

[41] Our s. 11 of the Defamation Act 1957 provides for the defence of absolute privilege on reports of judicial proceedings. Section 11 reads:

> 11(1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercise judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bona fide* comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

[42] The learned plaintiff's counsel submitted that the main issue in this case is whether 1st defendant, acted as a watching brief counsel, had the right to address the court, without been invited nor allowed by the court.

[43] It is also the learned plaintiff's counsel submission that, the issue whether the presiding magistrate was influenced by the 1st defendant's submission, to make her decide to allow plaintiff to be handcuffed, pending bail process, is a triable issue.

[44] In my judgment, the answer to the learned counsel's contention can be found in *Public Prosecutor v. Seeralan Suppiah* [1985] 1 CLJ 524; [1985] CLJ (Rep) 250, where Salleh Abas LP (delivering the judgment of the Supreme Court) said:

> A defence counsel present at an inquest is not there to defend anyone, but only to look after the interests of those who engage them. Whilst he has no right to speak as of right, this right seldom becomes an issue because the court normally gives such indulgence whenever it is asked. However, although addressing the court without permission is not a contempt it is certainly not polite to do so without permission. In polite circles such as the legal profession, this simple etiquette is expected.

The Finding

[45] After a careful reading of the notes of proceedings before the learned Magistrate and the notes of proceedings before the High Court Judge exhibited as "exh. KK18" and "exh. KK19" in encl. 11 respectively, and the affidavits relating to the application to strike out the writ and statement of claim (encl. 4, 8 and 11), and the plaintiff's affidavits in opposing the defendants' application (encl. 5, 7, 9 and 10), it appeared to me that the learned magistrate had allowed the 1st defendant to address the court and make a submission. If indeed the 1st defendant had not obtained leave, the learned Magistrate would have stopped or prevented the 1st defendant from addressing the court. Hence, the issue whether the 1st defendant had exceeded his authority as a watching brief counsel is no longer a triable issue. There is clearly no triable issue established here. The statement of claim also failed to disclose a cause of action (*Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219, [1988] 1 CLJ (Rep) 63).

In *Mahadevi Nadchatiram (supra)* cited by learned counsel for plaintiff, the alleged remarks was made not in the course of legal proceedings, and thereby distinguished.

[46] Thus, from the facts disclosed, there could be no doubt that:

(a) the words complained were uttered by the 1st defendant on a privileged occasion – ie, in the course of judicial proceedings and made in open court during the bail application in the Georgetown Magistrate's Court criminal case no. 83-1739-2007; and

(b) the statement complained is clearly within the line indicated by the authorities as the boundary of the advocate's privilege and therefore constitute absolute privilege.

Conclusion

[47] As such I dismiss the appeal notice of the plaintiff dated 19 September 2008 (encl. 17) with costs, and strike out the writ of summons and statement of claim as it discloses no cause of action, frivolous, vexatious and an abuse of the process of court.